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that he did not commit the acts of intercourse charged and was found not guilty. Later he was indicted for perjury on the ground that this testimony was false. *Held*, he may not plead *autrefois acquit*. *Murff v. State* (Tex.), 172 S. W. 238.

The first question in this class of cases is whether the rule as to former jeopardy bars the prosecution for perjury. Clearly it does not because the prosecutions are for different offenses, one being for rape and the other for perjury for false swearing in the rape case. See *Allen v. United States*, 194 Fed. 664, 39 L. R. A. (N. S.) 385. The question involved in the principal case is whether the accused can claim *res judicata*. The doctrine of *res judicata* must be confined to the facts absolutely essential to the determination of the guilt or innocence of the accused, or else no indictment for perjury could be sustained because perjury lies for false swearing upon any material fact. *People v. Dowdall*, 124 Mich. 166, 82 N. W. 810. In the principal case since the fact of intercourse, if established, alone would not have convicted the accused, the perjury was relative to facts, the determination of which did not necessarily cause the acquittal of the accused. For this reason the doctrine that the accused can be held for perjury in such a case seems correct both on principle and on authority. *State v. Smith* (Minn.), 137 N. W. 295; *People v. Albers*, 137 Mich. 678, 100 N. W. 908; *State v. Bevill*, 79 Kan. 524, 100 Pac. 476, 17 Ann. Cas. 753; *State v. Williams*, 60 Kan. 837, 58 Pac. 476. But where the acquittal of the accused of the first offense is sustained by the facts upon which the perjury is based, the issues in the two cases being identical, the question is *res judicata* and the prosecution for perjury is barred. *Cooper v. Commonwealth*, 106 Ky. 909, 51 S. W. 789; *Coffey v. United States*, 116 U. S. 436. In some cases the rule, based on grounds of public policy, is laid down, that even though the issues in the two cases are identical and the facts upon which the perjury is based were necessarily determined in the acquittal on the first charge, the doctrine of *res judicata* will not be applied in criminal trials and the indictment for perjury will be sustained. *State v. Vandemark*, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161.

EXECUTORS AND ADMINISTRATORS—DESIGNATION BY WILL OF ATTORNEY FOR EXECUTOR.—A testator by his will directed that his son should be employed by the executors as sole attorney in the settlement of the estate. *Held*, the provision is unenforceable. *In re Wallach* (App. Div.), 150 N. Y. Supp. 302.

There is no legal requirement that an executor shall employ counsel to aid him in the administration of the estate, but the matter is left entirely to his discretion to engage such counsel as he may deem necessary. *Young v. Alexander*, 84 Tenn. (16 Lea) 108; *In re Ogier*, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61; *Sprinkle v. Forrester*, 162 Ill. App. 45. The executor is personally liable in the first instance for the fees of any attorney employed, and they do not constitute debts against the estate. *In re Smith's Estate* (Iowa), 146 N. W. 836; *Clark v. Sayre*, 122 Iowa 591, 98 N. W. 484; *Taylor v. Mygatt*, 26 Conn. 184; *In re Caldwell*, 188 N. Y. 115, 80 N. E. 663. But the executor will be reimbursed from

the estate in a proper case for such fees as are reasonably necessary, *Sprinkle v. Forrester, supra*; *In re Sawyer's Estate*, 124 Iowa 485, 100 N. W. 484; *Davidson v. Sibley*, 140 Ga. 707, 79 S. E. 855, but not if the employment of the attorney was improper or the fees excessive. *In re Bullion's Estate*, 87 Neb. 700, 128 N. W. 32. He is also liable to the beneficiaries under the will for a proper administration of the estate and ordinarily the advice of counsel will not protect him in case of mismanagement. *Young v. Alexander supra*; *In re Bullion's Estate, supra*. In view of the personal liability for the proper management and conduct of the administration, and the advice and assistance of counsel being for his own protection, and the fact of his being personally liable to them for their compensation, the administrator or executor has the right to select and employ his own counsel, without regard to the wishes of the testator. *Young v. Alexander supra*; *In re Ogier, supra*; *In re Picket's Will*, 49 Ore. 127, 89 Pac. 377; *Foster v. Elsley*, L. R. 19 Ch. Div. 518, 30 W. R. 596.

Though it is well settled that a testator is entitled to select his executor, so that the probate court has no discretion to reject the person selected in the absence of some common-law or statutory disability, as he derives his powers from the will itself, *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714; *Appeal of Smith*, 61 Conn. 420, 24 Atl. 273, 16 L. R. A. 538; *Holladay v. Holiaday*, 16 Or. 147, 19 Pac. 81, yet it does not at all follow that the appointment by a will of an attorney for the executor is binding. The reason for the unenforceability of such an appointment is obvious from the manifest injustice that would be done the executor in rendering him liable for the attorney's fees and any loss occasioned by such and at the same time denying him the right to choose the attorney.

FEDERAL EMPLOYERS' LIABILITY ACT—INSTRUCTIONS—DAMAGES.—In an action brought under the Federal Employers' Liability Act, for the benefit of the widow and infant children of the deceased, the court instructed the jury that the pecuniary injury suffered in such a case was much greater than when the beneficiaries were all adults or dependents who are mere next of kin. *Held*, the giving of such an instruction is a reversible error. *Norfolk & Western Ry. Co. v. Holbrook*, 35 Sup. Ct. 143.

In an action under the Federal Employers' Liability Act the beneficiaries can recover their pecuniary loss and nothing more. *Michigan Cent. Ry. Co. v. Vreeland*, 227 U. S. 59; *American Ry. Co. v. Didricksen*, 227 U. S. 145; *Gulf, etc., Ry. Co. v. McGinnis*, 228 U. S. 173. And it is well settled that the rules by which damages are to be estimated should be laid down by the court, and it is the duty of the court to explain to the jury the basis on which the assessment should be made. *Chicago, Evanston, etc., Ry. Co. v. Adamick*, 33 Ill. App. 412; *Baltimore & O. Ry. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052. The relationship between the beneficiaries and the deceased should be taken into consideration in computing the pecuniary loss, and an infant child of the deceased would ordinarily suffer greater damage than an adult beneficiary, or mere